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UNITED STATES OF AMERICA
15

16 UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA
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19 UNITED STATES OF AMERICA,

20 Plaintiff,

21 v.

22 JOSE ALFARO, et al.,

23 Defendants.
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No. CR 09-466-DSF

REQUEST FOR DISMISSAL WITHOUT
PREJUDICE PURSUANT TO FEDERAL RULE
OF CRIMINAL PROCEDURE 48(a) OF:
(1) COUNT ONE AS TO DEFENDANT
SANCHEZ ONLY; (2) COUNT NINE AS
TO DEFENDANTS FUENTES, SANCHEZ,
CENDEJAS, AND PINEDA; AND
(3) COUNT SIXTEEN AS TO DEFENDANT
SANCHEZ ONLY; OPPOSITION TO
DEFENDANTS SANCHEZ'S AND FUENTES'
MOTIONS TO DISMISS INDICTMENT

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, the United States Attorney for the Central District of California hereby requests leave of Court to dismiss the following counts of the indictment in this case without prejudice:

- Count One as to defendant Alex Sanchez only;
- Count Nine as to defendants Juan Fuentes, Sanchez, Juan Cendejas, and Ruben Pineda; and
- Count Sixteen as to defendant Sanchez only.

The government further requests that the Court strike Racketeering Act 15 and Overt Acts 108 and 109 from Count One.

This request is based on the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may request.

Dated: December 17, 2012

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

/s/ Elizabeth R. Yang
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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

In their Motions to Dismiss, defendants Alex Sanchez ("defendant Sanchez") and Juan Fuentes ("defendant Fuentes")¹ (collectively "defendants") raise serious questions regarding the evidence presented to the grand jury and the manner in which it was presented. Although the government disputes defendants' allegations of misconduct and grand jury abuse, the government agrees that the grand jury presentation with respect to the conspiracy to murder Walter Lacinos, aka "Camaron," was flawed. In order to correct the errors and omissions in the initial presentation, the government asks the Court to dismiss without prejudice, pursuant to Federal Rule of Criminal Procedure 48(a), the following counts of the indictment:

- Count One (RICO Conspiracy) as to defendant Sanchez only;
- Count Nine (VICAR based on conspiracy to murder Lacinos) as to defendants Juan Fuentes, Sanchez, Juan Cendejas,² and Ruben Pineda;³ and

¹ Defendant Fuentes has filed a joinder to defendant Sanchez's motion, but has not articulated separate or independent grounds for dismissal. (See Def. Fuentes' Joinder as to Motion to Dismiss Indictment (CR 1234)). Defendant Fuentes has also filed a Motion for a Bill of Particulars with respect to Racketeering Act 15 of Count One and Count Nine. (See CR 1231). Because the government is requesting dismissal of Count Nine and the striking of Racketeering Act 15 and Overt Acts 108 and 109 from Count One, all of which allege the conspiracy to murder Lacinos, defendant Fuentes' motion for a bill of particulars is moot. However, defendant Fuentes remains properly charged in Count One. See footnote 5 below.

² On December 10, 2012, defendant Cendejas entered a guilty plea to Count One of the indictment pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). The plea agreement calls for the dismissal

- Count Sixteen (narcotics trafficking conspiracy) as to defendant Sanchez only.

The government further requests that the Court strike Racketeering Act 15 and Overt Acts 108 and 109 from Count One, as the conspiracy to murder Lacinis forms the basis of these allegations as well.

The government makes this request with the express intention of re-filing certain of the dismissed charges, including certain charges with respect to defendant Sanchez, as part of a superseding indictment in this case.⁴ Accordingly, the government opposes defendants Sanchez's and Fuentes' motions to dismiss the charges specified above to the extent that they seek dismissal with prejudice, and opposes defendant Fuentes' motion to dismiss to the extent that it seeks to dismiss Count One as against defendant Fuentes.⁵

of Count Nine as against defendant Cendejas at the time of sentencing. As a result, the government has no objection to dismissing Count Nine against him at this time without prejudice, with the dismissal to become final should the Court accept the plea agreement.

³ Defendant Pineda is a fugitive. He remains charged in Counts One and Sixteen. See footnote 5 below.

⁴ A determination of which of the dismissed charges will be pursued will be made only after a thorough re-review of the evidence.

⁵ Although the government does not dispute that there were errors in the presentation of evidence regarding Count Nine of the indictment, defendant Fuentes fails to identify any defects in the grand jury presentation with respect to the allegations in Count One as against him or any prejudice he has suffered as a result of anything which took place before the grand jury in this case that would affect the validity of the charge against him in Count One.

1 A district court should grant a motion to dismiss without
2 prejudice if the court finds that the government is acting in good
3 faith. See United States v. Hayden, 860 F.2d 1483, 1487 (9th Cir.
4 1988) ("While the judiciary has been authorized to supervise
5 prosecutorial decisions to dismiss, Rule 48(a) was not enacted for
6 the purpose of usurping the traditional role of the prosecutor to
7 determine whether to terminate a pending prosecution."). Examples
8 of bad faith dismissals include cycles of dismissal and reindictment
9 for the purpose of harassment. See id.; see also United States v.
10 Wallace, 848 F.2d 1464, 1468-69 (9th Cir. 1988) (noting bad faith
11 reasons for dismissal, including moving for dismissal moments before
12 trial because the prosecutor did not like the jury or dismissing
13 charges with the intention that defense witnesses would become
14 unavailable).

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17 Here, the government's motion to dismiss demonstrates the good
18 faith contemplated by Rule 48(a). The government believes that
19 there is sufficient evidence to support certain of the dismissed
20 charges, including certain of the charges against defendant Sanchez,
21 but recognizes and takes very seriously the errors in the initial
22

23 See Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988);
24 United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir. 1977).

25 Defendant Pineda has not filed a motion to dismiss. The flaws
26 in the presentation with respect to Count Nine, however, lead the
27 government to seek dismissal of that count, without prejudice, as to
28 him as well. As with defendant Fuentes, however, the flaws with
respect to Count Nine do not justify dismissal of Counts One and
Sixteen as to defendant Pineda.

1 presentation to the grand jury and seeks the opportunity to correct
2 the mistakes made in the previous grand jury presentation by re-
3 presenting this case to a new grand jury, focusing on the facts
4 likely to be in dispute at trial. Defendants have been provided
5 with tens of thousands of pages of discovery in this case and are on
6 ample notice of the government's intentions. In addition, the
7 government will provide defense counsel with additional discovery
8 relating to any additional grand jury proceedings as soon as it
9 becomes available. Under these circumstances, the government has
10 demonstrated that it is acting in good faith and its motion for
11 dismissal without prejudice should therefore be granted.
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13 Where a timely filed indictment is dismissed without prejudice
14 "for any reason after the period prescribed by the applicable
15 statute of limitations has expired," the government has six months
16 to refile a new indictment. 18 U.S.C. § 3288; see also United
17 States v. Peloquin, 810 F.2d 911, 912 (9th Cir. 1987) (the § 3288
18 "Savings Clause" applies to situations in which the original timely
19 filed indictment was dismissed due to flaws in the grand jury
20 proceedings) (citing United States v. Charnay, 537 F.2d 341, 355
21 (9th Cir. 1987)).

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1 **II. CONCLUSION**

2 For the foregoing reasons, the government respectfully requests
3 that the Court dismiss Counts One, Nine, and Sixteen of the
4 indictment, as against the defendants set forth above, without
5 prejudice; strike Racketeering Act 15 and Overt Acts 108 and 109
6 from Count One; deny defendants Sanchez's and Fuentes' motions to
7 dismiss with prejudice; and deny defendant Fuentes' motion to
8 dismiss Count One as against him.

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10 Dated: December 17, 2012

Respectfully submitted,

11 ANDRÉ BIROTTE JR.
12 United States Attorney

13 ROBERT E. DUGDALE
14 Assistant United States Attorney
Chief, Criminal Division

15 /s/ Elizabeth R. Yang
16 ELIZABETH R. YANG
17 Assistant United States Attorney
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16 UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA

18 UNITED STATES OF AMERICA,	No. CR 09-466-DSF
19 Plaintiff,	<u>[proposed] ORDER</u>
20 v.	
21 JOSE ALFARO, et al.,	
22 Defendants.	
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1 Upon the request of the United States of America pursuant to
2 Rule 48(a) of the Federal Rules of Criminal Procedure, the Court
3 HEREBY FINDS that the government's request to dismiss is made in
4 good faith and HEREBY DISMISSES WITHOUT PREJUDICE the following
5 counts of the indictment in this case:

- 6 • Count One as to defendant Alex Sanchez only;
- 7 • Count Nine as to defendants Juan Fuentes, Sanchez, Juan
8 Cendejas, and Ruben Pineda; and
- 9 • Count Sixteen as to defendant Sanchez only.

10 The Court FURTHER ORDERS that the following allegations be
11 stricken from the indictment in this case:

- 12 • Racketeering Act 15 in Count One; and
- 13 • Overt Acts 108 and 109 in Count One.

14 IT IS SO ORDERED.

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16 Dated:

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19 THE HONORABLE DALE S. FISCHER
20 UNITED STATES DISTRICT COURT JUDGE
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